BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA
DOCKET NO. 2004-316-C

In the Matter of	)	
	)	
Petition of BellSouth Telecommunications, Inc. to Establish	)	**BRIEF OF THE JOINT**
Generic Docket to Consider Amendments to Interconnection	)	**PETITIONERS**
Agreements Resulting from Changes of Law Docket	)	

Joint Petitioners respectfully submit their Brief in Support of Emergency Relief to the South Carolina Public Service Commission ("Commission") in support of the Petition filed with this Commission on March 2, 2005. As set out herein, Joint Petitioners are entitled to an Emergency Declaratory Ruling finding that BellSouth Telecommunications Inc. ("BellSouth") may not unilaterally amend or breach its existing interconnection agreements with the Joint Petitioners or the Abeyance Agreement entered into by and between BellSouth and Joint Petitioners (collectively, "the Parties").

Introduction

Joint Petitioners have brought the instant matter before the Commission in light of BellSouth's February 11, 2005 Carrier Notification and February 25, 2005 Revised Carrier Notification stating that certain provisions of the FCC's *Triennial Review Remand Order* ("*TRRO*") regarding new orders for de-listed UNEs ("new adds") are self-effectuating as of March 11, 2005.[1] BellSouth's pronouncement is based on a fundamental misreading of the *TRRO*. As with any change in law, the *TRRO* is a change that must be incorporated into interconnection agreements prior to being effectuated. It is not self-effectuating, as BellSouth claims. To the contrary, the FCC clearly stated that the *TRRO* and the new Final Rules issued

[1] BellSouth Carrier Notification at 1. BellSouth filed its Carrier Notification with the Commission in Docket No. 2004-316-C on February 14, 2005 (BellSouth Notice of Submission Attachment). BellSouth revised its Carrier Notification on February 25, 2005.

therewith would be incorporated into interconnection agreements via the section 252 process, which requires negotiation by the Parties and arbitration by the Commission of issues which Parties are unable to resolve through negotiations.

Thus, as with any change in law, the *TRRO* is a change that must be incorporated into interconnection agreements prior to being effectuated. NuVox, KMC and Xspedius have agreed with BellSouth that the *TRRO*, as well as the older *TRO* changes in law will be incorporated into their new arbitrated interconnection agreements. Accordingly, the Parties' new interconnection agreements will incorporate, *inter alia*, older *TRO* changes of law more-favorable-to-Joint Petitioners (such as commingling rights and clearer EEL eligibility criteria), as well as newer *TRRO* changes of law more-favorable-to-BellSouth (such as limited section 251 unbundling relief). The Parties' new South Carolina interconnection agreements certainly will not be in place by March 11, 2005.

BellSouth has taken an all or nothing approach to the *TRO* and past changes of law and it should not be permitted to pick-and-choose out of the *TRRO* the changes-of-law that are most favorable to it, while making NuVox and others wait-out arbitrations and/or the generic docket proceeding to get the *TRO* changes, such as commingling and clearer EEL eligibility criteria, that are more favorable to them. In South Carolina, a generic proceeding has been established (2004-316-C), and the Joint Petitioners intend to re-file for arbitration on or about March 10, 2005, and in no case later than March 15, 2005. Until the Parties are through these proceedings, or otherwise reach negotiated resolution, they must abide by their existing interconnection agreements. That is what the interconnection agreements require. That is what the Parties' Abeyance Agreement requires. That also is what the *TRRO* requires. And that is what is fair.

The Commission must act now to prevent BellSouth from taking unilateral action on March 11, 2005 that would effectively breach and/or unilaterally amend Joint Petitioners' existing interconnection agreements. Importantly, the Commission's action must address all "new adds."[2] For facilities-based carriers like Joint Petitioners, high capacity loops and high capacity transport UNEs are essential and they are jeopardized by BellSouth's Carrier Notification.

Joint Petitioners will suffer imminent and irreparable harm if BellSouth is allowed to breach or unilaterally modify the terms of the Parties' existing interconnection agreements and Abeyance Agreement by refusing to accept local service requests ("LSRs") for new DS1 and DS3 loops and transport that BellSouth claims is delisted by application of the Final Rules. Although used by Joint Petitioners to a lesser extent, the same is true for UNE-P. Furthermore, South Carolina consumers relying on Joint Petitioners' services will be harmed if BellSouth is permitted to implement its announced plan to breach and/or unilaterally modify interconnection agreements by refusing to accept LSRs for "new adds" as of March 11, 2005. South Carolina businesses and consumers could be left without ordered services while the Parties sort out the morass that will be created by BellSouth's unilateral decision to reject certain UNE orders. The resulting morass also likely would lead to a flood of litigation and complaint dockets before the Commission.

Accordingly, Joint Petitioners seek an Order declaring *inter alia* that Joint Petitioners shall have full and unfettered access to BellSouth UNEs provided for in their existing interconnection agreements on and after March 11, 2005, until such time that those agreements

[2] On March 1, 2005, the Georgia Commission voted to prevent BellSouth from taking action to unilaterally implement the *TRRO* with respect to all "new adds" as proposed in BellSouth's Carrier Notification. In voting to adopt the Georgia Commission Staff's recommendation, the Georgia Commission made clear that the Commission's decision applied to all carriers and all "new adds" (*i.e.*, it is not limited to MCI or UNE-P). A final written order from the Georgia Commission is not yet available.

are replaced by new interconnection agreements resulting from the upcoming arbitration between the Parties.

Factual Background

On February 11, 2004, Joint Petitioners filed jointly with this Commission a petition for arbitration of an interconnection agreement with BellSouth. The matter was assigned Docket No. 2004-42-C. On March 2, 2004, the U.S. Court of Appeals for the D.C. Circuit in *United States Telecom Ass'n v. FCC* ("*USTA II*")[3] affirmed in part, and vacated and remanded in part, the FCC's *Triennial Review Order* ("*TRO*"), which obligated ILECs to provide requesting telecommunications carriers with access to certain UNEs.[4] The D.C. Circuit initially stayed its *USTA II* mandate for 60 days. The stay of the *USTA II* mandate later was extended by the D.C. Circuit for a period of 45 days, until June 15, 2004 on which date the D.C. Circuit's *USTA II* mandate issued. At that time, certain of the FCC's rules applicable to BellSouth's obligation to provide CLECs with UNEs were vacated.

On June 30, 2004, BellSouth and Joint Petitioners entered into an Abeyance Agreement which was later memorialized in a July 16, 2004 Joint Motion to Withdraw Petition for Arbitration ("Abeyance Agreement") with the expectation that the FCC would soon issue additional and new rules governing ILECs' obligations to provide access to UNEs.[5] Specifically, the Abeyance Agreement provided for an abatement of the Parties' ongoing arbitration in order to consider *inter alia* how the post-*USTA II* regulatory framework ("*USTA II* and its progeny")

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3 359 F.3d 554 (D.C. Cir. 2004).

4 *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, CC Docket Nos. 01-338, 96-98, 98-147 (rel. Aug. 21, 2003)("*Triennial Review Order*") ("*TRO*").

5 The Abeyance Agreement was filed in the form of a Joint Motion in Docket No. 2004-42-C (filed July 16, 2004).

should be incorporated into the new agreements being arbitrated.[6] The Parties agreed to avoid the duplicative process of negotiating/arbitrating change-of-law amendments to their existing interconnection agreements and agreed instead to continue to operate under their existing interconnection agreements until their arbitrated successor agreements become effective.[7] Per the Abeyance Agreement, Joint Petitioners will be re-filing for arbitration and are currently planning to do so on or about March 10, 2005. The Commission issued an order granting the Parties' Abeyance Agreement (*i.e.*, the Joint Motion) on October 6, 2004.

On August 20, 2004, the FCC released its *Interim Rules Order*, which held *inter alia* that ILECs shall continue to provide unbundled access to switching, enterprise market loops and dedicated transport under the same rates, terms and conditions that applied under their interconnection agreements as of June 15, 2004.[8] The FCC required that those rates, terms and conditions remain in place until the earlier of the effective date of final unbundling rules, or six months after publication of the *Interim Rules Order* in the Federal Register.[9]

On February 4, 2005, the FCC released the *TRRO*, including its latest Final Unbundling Rules.[10] In the *TRRO*, the FCC found *inter alia* that requesting carriers are not impaired without access to local switching and dark fiber loops. The FCC also established conditions under which ILECs would be relieved of their obligation to provide, pursuant to section 251(c)(3), unbundled

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6 Abeyance Agreement at Paragraph 5.

7 *Id.*

8 *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* Order and Further Notice of Proposed Rulemaking, WC Docket No. 04-313, CC Docket No. 01-338 (rel. Aug. 20, 2004) ("*Interim Rules Order*").

9 *Id.* ¶ 21.

10 *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* Order on Remand, WC Docket No. 04-313, CC Docket No. 01-338 (rel. Feb. 4, 2005)("*Triennial Review Remand Order*") ("*TRRO*"). BellSouth already has sought to overturn this order. *United States Telecom Ass'n et. al. v. FCC*, Supplemental Petition for Writ of Mandamus, Nos. 00-1012 *et. al.* (D.C. Cir.), filed Feb. 14, 2005 (BellSouth, Qwest, SBC and Verizon were parties to the pleading).

access to DS1 and DS3 loops, as well as DS1, DS3 and dark fiber dedicated transport. In the section of the *TRRO* entitled "Implementation of Unbundling Determinations" the FCC held that "incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act."[11] The *TRRO* will become an effective FCC order on March 11, 2005.[12]

On February 11 2005, BellSouth issued a Carrier Notification in which BellSouth alerted carriers to the issuance of the *TRRO* and made certain unfounded pronouncements regarding the effects of that order. Specifically, BellSouth claimed that "with regard to the issue of 'new adds'… the FCC provided that no 'new adds' would be allowed as of March 11, 2005, the effective date of the *TRRO*."[13] BellSouth further claimed that "[t]he FCC clearly intended the provisions of the *TRRO* related to 'new adds' to be self-effectuating," *i.e.*, "without the necessity of formal amendment to any existing interconnection agreements."[14] BellSouth stated that as of March 11, 2005 it would reject UNE-P orders and orders for high capacity loops and transport where it has been relieved of its obligation to provide such UNEs, except where such orders are certified in accordance with paragraph 234 of the *TRRO*.[15] BellSouth also announced that it would not accept new orders for dedicated transport "UNE entrance facilities" or "UNE dark fiber loops" under any circumstances.[16] On February 28, 2005, BellSouth issued a revised Carrier Notification indicating that it would refuse to provision copper loops capable of providing HDSL on March 11, 2004, as well. On February 14, 2005, BellSouth filed a

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11 *Id.* ¶ 233.

12 *Id.* ¶ 235.

13 Carrier Notification at 1.

14 *Id.* at 2.

15 *Id.*

16 *Id.*

submission in Docket No. 2004-316-C alleging that the "TRRO's provisions as to 'new adds' constitute a generic self-effectuating change for all interconnection agreements, and they are effective March 11, 2005, without the necessity of formal amendments to any existing interconnection agreements."[17]

Legal Argument

A. The *TRRO* Is Not Self-Effectuating

Contrary to the positions asserted by BellSouth in its Carrier Notifications, the *TRRO* is not self-effectuating with regard to "new adds" or, for that matter, in any other respect (including any changes in rates of the availability of access to UNEs). In fact, in the section of the *TRRO* entitled "Implementation of Unbundling Determinations" the FCC plainly states that "incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act."[18] Section 252 of the Act requires negotiations and state commission arbitration of issues that cannot be resolved through negotiation. This process is not "self effectuating." This decision by the FCC to employ the traditional process by which changes of law are implemented is reflected in several instances throughout the *TRRO*.[19]

First, with regard to high capacity loops, the FCC held that "carriers have twelve months from the effective date of this Order to modify their interconnection agreements, including completing any change of law processes."[20] The FCC also stated that "we expect incumbent LECs and requesting carriers to negotiate appropriate transition mechanisms for such facilities

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17 BellSouth Submission, at 1-2.

18 *TRRO* ¶ 233.

19 The FCC also recognized that, pursuant to section 252(a)(1), carriers are free to negotiate alternative arrangements that would result in standards governing their relationships that differ from the rules adopted in the *TRRO*. *See id.* ¶¶ 145, 198, 228.

20 *Id.* ¶ 196.

through the section 252 process."[21] Second, with regard to high capacity transport, the FCC also stated that "carriers have twelve months from the effective date of this Order to modify their interconnection agreements, including completing any change of law processes."[22] And the FCC also stated that "we expect incumbent LECs and requesting carriers to negotiate appropriate transition mechanisms for such facilities through the section 252 process."[23] Finally, with regard to UNE-P arrangements, the FCC also held that "carriers have twelve months from the effective date of this Order to modify their interconnection agreements, including completing any change of law processes."[24] Thus, the FCC in no way indicated that it was unilaterally modifying state commission approved interconnection agreements or that the changes-of-law that would become effective on March 11, 2005 would automatically supplant provisions of existing interconnection agreements as of that date.

The "different direction" BellSouth claims the FCC took with respect to "new adds" is not evident in the *TRRO*; instead it is simply another diversion created by BellSouth. In a pleading on this issue filed with the Georgia Commission, BellSouth argues that the FCC can and did modify existing interconnection agreements in the manner alleged in its Carrier Notification. Neither aspect of the assertion is true. In support of its contention that the FCC can modify existing interconnection agreements, BellSouth cites the *Mobile-Sierra* doctrine. In so doing, however, BellSouth fails to reveal that the FCC has expressly found that "the *Mobile-Sierra* analysis does not apply to interconnection agreements reached pursuant to sections 251 and 252 of the Act, because the Act itself provides the standard of review of such agreements."

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21 *Id.* at note 519.

22 *Id.* ¶ 143.

23 *Id.* at note 399.

24 *Id.* ¶ 227.

IDB Mobile Communications, Inc. v. COMSAT Corp., 16 FCC Rcd 11475 at note 50 (May 24, 2001). Even if that were not the case, there is simply no evidence that the FCC employed the *Mobile-Sierra* doctrine and made the requisite public interest findings for doing so in the *TRRO.* There is no express statement in the *TRRO* that says that the FCC intended to reform existing interconnection agreements. And there is no discussion of why negating certain terms of existing interconnection agreements is compelled by the public interest. Instead, the FCC stated quite plainly in paragraph 233 that the normal section 252 negotiation/arbitration process applies.

Notably, the FCC's position in the *TRRO* also mirrors the position it took in the *TRO.* In the *TRO,* the FCC declined Bell Operating Company requests to override the section 252 process and unilaterally change all interconnection agreements to avoid any delay associated with the renegotiation of contract provisions, explaining that "[p]ermitting voluntary negotiations for binding interconnection agreements is the very essence of section 251 and section 252." [25]

BellSouth cannot escape the FCC's clear and unambiguous language requiring parties to amend their interconnection agreement pursuant to change of law processes. The Commission must not allow BellSouth to avail itself of its tortured interpretation of the *TRRO* with respect to "new adds." Accordingly, Joint Petitioners seek a declaration that the *TRRO*'s unbundling decisions and transition plans do not "self effectuate" a change to the Parties' existing interconnection agreements and that they will not govern the Parties relationships until such time as – and only to the extent – that the agreements currently being arbitrated are modified to incorporate such unbundling decisions and transition plans.

[25] *TRO* ¶ 701.

B. The Abeyance Agreement Requires BellSouth to Continue to Provision UNEs Under the Terms of the Parties Existing Agreements, Until those Agreements Are Replaced with New Agreements

The terms of the Abeyance Agreement clearly require BellSouth to abide by the terms of the Parties' existing interconnection agreements until such agreements are replaced with new agreements currently being arbitrated. BellSouth and Joint Petitioners voluntarily agreed to continue to operate under the Parties' existing interconnection agreements until they are able to move into the arbitrated agreements that result from the upcoming arbitration docket. In the Abeyance Agreement, the Parties stated that they agreed to the abatement period so that they can "incorporate the negotiation of those issues precipitated by *USTA II*, as well as continue to negotiate previously identified issues outstanding between the Joint Petitioners and BellSouth."[26] To implement these shared objectives, BellSouth and the Parties agreed to "continue operating under their current Interconnection Agreements until such time as they move into a new agreement (either via negotiated agreement or via arbitration pursuant to a subsequent petition for arbitration of a new interconnection agreement."[27]

BellSouth and the Joint Petitioners further agreed in the Abeyance Agreement to an orderly procedure for implementing whatever UNE rule changes ultimately resulted from *USTA II*. Since the Parties had all expended considerable resources in negotiating replacements to their expired interconnection agreements, and the process already was at the arbitration stage, it made no sense to anyone involved to waste time negotiating and arbitrating amendments to their soon-to-be-replaced expired interconnection agreements. Instead, all concerned agreed to identify the issues raised by *USTA II* and its "progeny" (i.e., the post-*USTA II* regulatory framework,

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[26] Abeyance Agreement, at 2.

[27] *Id.*, at 2.

including the FCC's Final Rules adopted in the *TRRO*[28]) and resolve them in the context of their arbitration proceeding to establish newly negotiated/arbitrated replacement interconnection agreements.[29]

Nonetheless, by self-proclaimed fiat, BellSouth now seeks to walk away from its commitments in the Abeyance Agreement and make an end run around the Commission's interconnection agreement arbitration process. By proclaiming that certain aspects of the *TRRO* are self-effectuating, and that BellSouth is entitled to unilaterally implement its disputed interpretation of those rule changes, BellSouth attempts to unilaterally amend the existing interconnection agreements that it previously agreed would not be changed, and renege on its agreement that the Parties would continue to operate under those agreements pending the outcome of the ongoing interconnection arbitration proceedings. As a simple matter of contract law and regulatory procedure, the Commission cannot allow BellSouth to simply abrogate the Abeyance Agreement and end run the arbitration process. Moreover, for BellSouth to ignore the commitments made to the Joint Petitioners in their Abeyance Agreement would constitute a breach of the duty to negotiate in "good faith" imposed on ILECs by Section 251(c)(1).

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[28] There are two FCC decisions that were contemplated by the parties at the time of the Abeyance Agreement and which now are the progeny of *USTA II*: the *Interim Rules Order* and the *Final Rules Order* (the *TRRO*). The common and widely understood meaning of the word "progeny" is "Children or descendants: OFFSPRING." Even Black's Law Dictionary adopts this meaning as the primary meaning of the word: "Children or descendants; offspring <only one of their progeny attended lawschool>." Black's Law Dictionary, 8th Ed. (2004). Even under the secondary definition adopted by Black's, it is clear that the *TRRO* is included in the progeny of *USTA II*. That definition provides: "In a figurative sense, a line of cases that follow a leading case <*Erie* and its progeny>." The fact that the *TRRO* is the order on remand from the DC Circuit's *USTA II* decision makes it plain that it is part of the line of decisions following from *USTA II*.

[29] The arbitration issues identified as a result of this process include Issue 23 (post federal transition period migration process), Issue 108 (*TRRO* / Final Rules), Issue 109 (*Interim Rules Order* intervening federal or state orders); Issue 110 (*Interim Rules Order* intervening court orders); Issue 111 (*Interim Rules Order* – transition plan / *TRRO* transition plan); Issue 112 (*Interim Rules Order* – frozen terms); Issue 113 (High Capacity Loop Unbundling Under 251/*TRRO*, 271, state law); Issue 114 (High Capacity Transport Unbundling Under 251/*TRRO*, 271, state law). These issues make clear that the *TRRO* is indeed a change of law that the Parties agreed would be addressed only in the context of the new negotiated/arbitrated interconnection agreements.

Joint Petitioners believe that BellSouth cannot implement the *TRRO* changes in law without modifying its interconnection agreements to reflect such rule changes. However, that is especially true with respect to the Joint Petitioners. BellSouth and the Joint Petitioners actually sat down and negotiated on that point immediately after *USTA II* became effective, agreed on the appropriate and orderly way to incorporate the post-*USTA II* rule changes into their new interconnection agreements, committed to continue operating under existing interconnection agreements UNE provisions (unchanged with respect to changes of law resulting from the TRO, as well as with respect to those changes of law resulting from the post-*USTA II Interim Rules Order* and *TRRO*) until the newly negotiated/arbitrated agreements are finalized, and submitted this mutual agreement and understanding on how to implement *USTA II*/*TRRO* to the Commission for approval. BellSouth certainly cannot be permitted to usurp its commitments made to the Joint Petitioners in the Abeyance Agreement and to this Commission. All concerned have acted in reliance upon those commitments, and proceeded through the arbitration process on that basis.

CONCLUSION

BellSouth's recent Carrier Notices regarding the *TRRO* are baseless and thinly veiled attempts to breach and or unilaterally amend the Parties' existing interconnection agreements. Moreover, these notices signal an intent to breach the Abeyance Agreement and to usurp the arbitration about to be conducted by the Commission. Joint Petitioners will be irreparably harmed and South Carolina consumers will suffer if BellSouth is permitted to breach the Parties' existing interconnection agreements or the Abeyance Agreement. Such action would also contravene the FCC's express directive that the *TRRO* is to be effectuated via the section 252 process. As a matter of law, this Commission must ensure that Joint Petitioners have full and

unfettered access to UNEs provided for in their existing interconnection agreements until such time as their agreements are superseded by the agreements to be arbitrated before the Commission.

Moreover, principles of equity and fairness dictate that BellSouth and Joint Petitioners should stand on equal footing and play by the same rules. Joint Petitioners have waited a long time to avail themselves of pro-CLEC changes of law such as commingling rules and clearer EEL eligibility criteria ushered in by the *TRO*. Indeed, both of those issues have been issues in the previous arbitration proceeding.[30] Even if they hadn't been arbitration issues, BellSouth has insisted on an all-or-nothing approach to implementing the changes-of-law ushered in by the *TRO*. BellSouth likewise must wait for the conclusion of the arbitration process to avail itself of *TRRO* changes of law favorable to it. This foundation of fairness is encapsulated in the Parties' Abeyance Agreement.

[30] Issue 26 addresses whether BellSouth must abide by the FCC's commingling rules (BellSouth insists that it is entitled to an unwritten exception to the rules) and it remains unresolved. Issue 50 addressed whether the EEL eligibility criteria should be incorporated to the agreement using the term "customer" (as in the rule) or another term defined by BellSouth in a manner that could be construed to limit Joint Petitioners' access to UNEs. BellSouth recently agreed to abide by the rule and the issue was resolved using Joint Petitioner's proposed language.

Therefore, Joint Petitioners respectfully request that the Commission declare that the transition provisions of the *TRRO* are not self-effectuating but rather are effective only at such time as the Parties' existing interconnection agreements are superseded by the interconnection agreements resulting from the upcoming arbitration docket. Further, the Commission must declare that the Abeyance Agreement requires BellSouth to continue to honor the rates, terms and condition of the Parties' existing interconnection agreements until such time as those Agreements are superseded by the agreements resulting from the upcoming arbitration docket.

Respectfully submitted,

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Dated: March 8, 2005

CERTIFICATE OF SERVICE

I hereby certify that I have, on this 8th day of March, 2005, caused to be served upon the following individuals, by electronic mail and first class U.S. mail, postage prepaid, a copy of the foregoing:

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